

## THREE PRINCIPLES OF DEMOCRATIC CRIMINAL JUSTICE

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**ABSTRACT**—This Essay links criminal theory to democratic political theory, arguing that the view of criminal law and procedure known as “reconstructivism” shares a common root with certain culturally oriented forms of democratic theory. The common root is the valorization of a community’s ethical life and the belief that law and government should reflect the ethical life of the community living under that law and government. This Essay then specifies three principles that are entailed by the union of democracy and reconstructivism and that should therefore characterize a democracy’s approach to criminal justice: the “moral culture principle of criminalization,” the “principle of prosocial punishment,” and the “We the People principle of criminal procedure.” As the American criminal system routinely violates all three principles, this Essay closes by suggesting that the present crisis of American criminal justice stems in substantial part from criminal law and procedure’s bureaucratic and instrumental, rather than democratic and reconstructive, path of development. The three principles point to a better alternative and suggest a direction for criminal justice reform.

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INTRODUCTION

The object of this Essay is to link a theory of criminal law and procedure I’ve developed in prior work, “reconstructivism,”<sup>1</sup> to the theory and practice of democracy. On the theoretical side, the claim is this: a decent community’s ethical life—by which I mean the moral culture disclosed by a community’s public deliberations or implicit in its social practices and institutions, provided those deliberations, practices, and institutions reflect or were formed in reasonably non-oppressive conditions—should command a measure of political authority in democratic societies because part of what collective self-determination means is that a political community can see its norms reflected in its laws. Ethical life should likewise command authority on a reconstructive approach to criminal law and procedure because reconstructivism holds that criminal justice’s distinctive social function is to protect and repair the social norms on which community solidarity depends in the wake of acts that attack those norms. Reconstructivism as a theory of criminal justice and democracy as a theory of government are thus linked by what they mutually treasure—by the fact that both valorize a decent community’s ability to build a distinctive form of life infused with values that are the community’s own.

On the practical side, this Essay specifies three principles that follow from the democracy/reconstructivism union and should therefore characterize a democratic society’s approach to criminal justice. Briefly stated, the “moral culture principle of criminalization” holds that, barring special conditions, only those acts that violate and attack the values on which social life is based, and can therefore truly be characterized as “antisocial,” should be legally designated crimes. The “principle of

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<sup>1</sup> Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485 (2016).

prosocial punishment” holds that punishment’s first purpose and justification is to provide a prosocial response to an antisocial act, restitching the social fabric that crime tears (assuming “crime” is defined according to the moral culture principle). Finally, the “We the People principle of criminal procedure” holds that the administration and enforcement of criminal law should be so structured that lay citizens take part in it and see their sense of justice at work in it, rather than left wholly to officials and experts acting on the instrumental reasons characteristic of bureaucratic control.

What is most striking about these three principles in light of American criminal justice today is how routinely they are violated: we criminalize for instrumental reasons unconnected to or inconsistent with our culture, we punish in ways that are nearly as antisocial as crime itself, and we administer and enforce criminal law through procedures that crowd lay voices out of the system and undermine social solidarity rather than building it. We have, in short, drifted away from what might be termed *democratic-reconstructive* forms of order in criminal justice and toward *bureaucratic-instrumental* ones, and this Essay’s final suggestion is that much of our present dysfunction traces back to this drift. So the three principles have something to teach us about the way out of the crisis. They do not by any means address all of the complex questions of law, practice, and policy the crisis presents, but I submit that these three principles illuminate the appropriate *direction* of change. They show us where the gap is between criminal law as it is and criminal law as it should be.

As this is an exceedingly short essay for goals so ambitious, a caveat is in order. The arguments here are designed to show how a set of ideas developed in prior work and planned future work hang together, not to explain and defend those ideas in full. Each of the pieces—reconstructivism, democracy, the three principles, the diagnosis of the present, the prescription for the future—is complicated and subject to reasonable objections that merit careful responses, which this Essay is not meant to provide. The only thing I hope to explain here is how the pieces fit into a whole.

#### I. RECONSTRUCTIVISM

Reconstructivism holds that criminal law and procedure have a distinctive role to play in the social world: where a wrong has been committed that is of such a nature as to attack the values on which social life is based, it is the office of criminal law to reconstruct that violated

normative order (hence “normative reconstruction” or “reconstructivism”).<sup>2</sup> To use the clichéd but helpful metaphor, where crime tears the social fabric, criminal law’s distinctive function is to restitch it. If criminal law does not do so and no adequate substitute for criminal law is found, the authority of the violated norm and the dignity of any violated victims will be diminished. The unanswered wrong will exact a cost in the currency of social solidarity: members of the society will over time come to feel less bound to one another, to the norm violated by the crime, and by extension to the normative order of the state and the law as a whole. Gradually, the society’s substructure of shared values will be altered or broken, and a society thus damaged will be less able to secure the flourishing of the community and the individuals who make it up than one with an intact, shared set of values.

Reconstructivism is thus a type of communitarian consequentialism,<sup>3</sup> but it is a minimal type of communitarianism because it is localized to criminal law, because the norms at work in criminal law tend to be (or should be) fairly basic and widely acknowledged, and because wrongs that attack the foundations of social life are uncommon and therefore leave plenty of room for norm contestation. So a reconstructivist need not be a communitarian about all things: one could, for example, be a reconstructivist about criminal law and favor the individualistic, creative destruction of free markets, because a reconstructivist could without inconsistency hold that the market should not have a communitarian character. Not every component of a complex society has the same internal norms or organizing ends. Nor need a reconstructivist disagree with political liberalism’s claim that societies are and should be comprised of diverse individuals and subcommunities with different sets of values, whose goal in the political sphere is to find fair terms of cooperation rather than complete normative agreement.<sup>4</sup> Emphatically, a reconstructivist can acknowledge and even celebrate norm contestation, particularly if one follows the thread of reconstructivism to deliberative democracy, as I

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<sup>2</sup> This discussion surveys the ground more fully covered in Kleinfeld, *Reconstructivism*, *supra* note 1.

<sup>3</sup> In a previous article, I stated: “[W]hile I don’t have strong objections to characterizing reconstructivism as consequentialist, I think the characterization obscures more than it illuminates.” Kleinfeld, *Reconstructivism*, *supra* note 1, at 1532. I now think that was an error: the “consequentialist” label is helpful.

<sup>4</sup> See JOHN RAWLS, *POLITICAL LIBERALISM* xviii, xxv (1993) (“[T]he problem of political liberalism is: How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical, and moral doctrines? . . . What are the fair terms of social cooperation between citizens characterized as free and equal yet divided by profound doctrinal conflict?”).

suggest below.<sup>5</sup> Reconstructivism's premise is only this: every society—including diverse, democratic ones (perhaps especially diverse, democratic ones)—needs some minimum of *normative alignment* around a shared set of values if it is to safeguard and advance the flourishing of the community and the individuals who make it up, because a society without that minimum will be unable to secure the benefits of social cooperation, mitigate the risks of social conflict, sustain itself over time, and maintain a functioning public sphere (including a sphere of values contestation).<sup>6</sup> That premise granted, reconstructivism only points out criminal law and procedure's distinctive place in maintaining this minimum of normative alignment.

Why “distinctive”? Many social practices and institutions contribute to maintaining normative alignment, most obviously educational ones; what makes criminal justice so important? The answer has to do with the special character of crime—that is, with the special problem presented by serious wrongdoing. The problem of wrongdoing is different from the problem of evil, which, in secular terms, is the problem of how we can rationally maintain belief in or hope for the goodness of the world in light

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<sup>5</sup> See *infra* Part II. In fact, the idea that communitarians of any sort must insist on an unchanging consensus of values misunderstands what is best in communitarianism. Robert Bellah expresses my view exactly:

Those who think of community as a form of *Gemeinschaft*, as well as their liberal critics, tend to think consensus about values and goals must be complete or nearly complete. Is such complete consensus realistic, or even desirable, in modern societies?

The answer, of course, is no. Yet this lack of unanimity need not create problems for supporters of community. While community-shared values and goals do imply something more than procedural agreement—they do imply some agreements about substance—they do not require anything like total or unarguable agreement. A good community is one in which there is argument, even conflict, about the meaning of the shared values and goals, and certainly about how they will be actualized in everyday life. Community is not about silent consensus; it is a form of intelligent, reflective life, in which there is indeed consensus, but where the consensus can be challenged and changed—often gradually, sometimes radically—over time.

Robert N. Bellah, *Community Properly Understood: A Defense of “Democratic Communitarianism,”* 6 RESPONSIVE COMMUNITY, no. 1, Winter 1995–96, at 49, 50.

<sup>6</sup> Even Rawls recognized the need for a minimum of such agreement—agreement about toleration, for example—if society is to function, and part of what makes Rawls so interesting is his clear-eyed recognition of the need for a form of justice that functions. His goal was to discern the premises of “a reasonably harmonious and stable pluralist society,” a society that is “over time . . . stable and just,” and his historical view was that “the success of liberal constitutionalism came as a discovery of a new social possibility . . . . Before the successful and peaceful practice of toleration in societies with liberal institutions there was no way of knowing of that possibility.” See RAWLS, *supra* note 4, at xxv (emphasis added). He thought that, in a liberal society, free and equal citizens divided by opposing “comprehensive doctrines” nonetheless “all affirm the political conception of a constitutional regime” and his goal was to discover how that might be so. *Id.* at xviii. But they “all affirm” something—something quite considerable, in fact. A Rawlsian could be a reconstructivist.

of the suffering in the world. The problem of wrongdoing is this: whatever society we build, however good and just, it is the human condition that some people some of the time will commit wrongs so serious as to attack, deny, and threaten the values on which society is based and on which the welfare of the individuals comprising society depends—wrongs both unbearable to endure and dangerous to ignore—and thus to live in a world of serious wrongdoing inevitably compels us to face the question of *how to respond*. Criminal justice is an institution of response; broadly conceived, criminal justice is simply the set of practices and institutions by which societies respond to serious wrongdoing. In a sense, serious wrongdoing *calls* criminal justice into being. It is reconstructivism’s insight that if such wrongdoing is not answered in a way that the community finds intelligible and adequate, the values and people targeted by such wrongdoing will be undermined. Thus the reason criminal justice plays a distinctive and important role in maintaining normative alignment is because criminal justice in some form is necessary to society’s self-maintenance in the wake of serious wrongdoing. The point of criminal law and procedure is not chiefly to dole out retributive justice, nor to optimize material costs and benefits, nor to minimize coercive harm, the way a Kantian retributivist, Benthamite utilitarian, or Millian liberal might propose.<sup>7</sup> Reconstructivism breaks with all three of these theories—the dominant theories of criminal justice in America today.<sup>8</sup> The fundamental purpose of criminal justice is to protect a society’s moral culture. If a theory can be measured by what it treasures, it is reconstructivism’s distinctive feature that it treasures a community’s lived moral culture—what Hegel termed *Sittlichkeit* (“embodied ethical life”)<sup>9</sup>—above individual just deserts, efficient crime control, or liberal mildness.

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<sup>7</sup> For the backdrop to this contrast, see Kleinfeld, *Reconstructivism*, *supra* note 1, at 1491–92, 1524–32.

<sup>8</sup> In Germany, by contrast, a strand of criminal theory has risen to prominence—the “affirmative general prevention” theory—that does focus on the need to affirm and defend norms following a crime. See Thomas Weigend, *Sentencing and Punishment in Germany*, in *SENTENCING AND SANCTIONS IN WESTERN COUNTRIES* 188, 209 (Michael Tonry & Richard S. Frase eds., 2001). Affirmative general prevention is a member of the reconstructive family, though just one member of the family.

<sup>9</sup> See G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* 404 § 34 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1821) (commentary by Allen W. Wood) (“‘Morality’ refers to the subjective life of the individual agent, in so far as it abstracts itself from its social and historical situation . . . ‘Ethics’ or ‘ethical life’ (*Sittlichkeit*) means something like ‘customary morality.’ Hegel uses it to refer simultaneously to a system of social institutions and to the moral attitude of the individual who identifies with and lives them.” (internal citations omitted)); see also ROBERT B. PIPPIN, *HEGEL’S PRACTICAL PHILOSOPHY: RATIONAL AGENCY AS ETHICAL LIFE* 6 (2008) (“[A]ny given social world is also a nexus of common significances, saliences, taboos, and a general shared orientation that can also either be sustained or can fail. Indeed one of the most interesting aspects of such a social condition, shared meaningfulness, or intelligibility, is that it can fail, go dead, lose its

To sharpen this contrast—and to see some of reconstructivism’s power relative to its competitors—consider how these four theoretical perspectives would understand the beating of Rodney King by police officers in 1991 and the riots that followed the officers’ acquittal. If we stipulate that the beating was a wrong that deserved punishment, a typical retributivist would see the acquittal in terms of individual injustice and the rioters’ violence as separate wrongs also deserving punishment, depending on the appropriate moral evaluation of each case. A typical utilitarian would see the beating and the riots in terms of crime control, injuries, and property damage, and would favor a set of responses designed to minimize crime and cost. A typical Millian would see the beating and riots as setbacks to liberty—the first a wrongful abuse of state power toward an individual, the second a wrongful failure of the state to protect individuals from one another—and would justify punishment in terms of minimizing coercive harm overall (perhaps coupled with a general taste for Enlightenment mildness). The problem with these responses is not so much that they are wrong or false as that they miss what matters most about the Rodney King situation. The retributive and liberal viewpoints are so individualistic that they cannot see the *sociological* character of the events, and the utilitarian viewpoint is so materialistic (in the sense of focusing on material, tangible things, like the body, property, and financial cost) that it cannot see the degree to which the events were about America’s *culture*.

A reconstructivist, by contrast, sees the Rodney King beating as encoding a social message that Americans with ordinary cultural fluency could not fail to understand: that the right to be free from violence is not secure in encounters with the police, at least if the suspect is black, which if true means that black Americans have lesser rights than other Americans. The wrong of the beating thus transmits a dual message, in part about claims of abstract principle (the right to physical integrity), and in part about the dignity of the victim and others like the victim (the social position of black Americans). One cannot understand the wrong in purely material or purely individual terms; to understand it is to understand its social meaning.

Yet that is just the first half of the story, for the key to understanding the Rodney King case from a reconstructive standpoint is to see that *the riots took place, not after the crime, but only after the acquittal*. The beating was caught on video and the video drew immense national attention, but no riots took place then. People are prepared to accept that

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grip, and a very great deal of what interests Hegel is simply what such shared practical meaningfulness must be that it could fail . . . . His general name for the achievement and maintenance of such a form of intelligible life is ‘*Sittlichkeit*’ . . . .”).

serious wrongs have taken place in their society, if only because they take place in every society. It was the *verdict*, not the crime, that spoke with the community's voice, and thus it was the verdict, not the crime, that had the power to affirm or deny the crime's message about violence, rights, and race for purposes of defining America's moral culture. Reconstructivism sees crime and punishment as an exchange of meanings, a conversation about the values that will prevail in a community. The issue for a reconstructivist is always what a crime and its punishment in a given cultural context *mean*. In the Rodney King case, the officers' actions were in effect an unanswered question to the country: "We regard ourselves as privileged to use any level of violence we see fit, at least in encounters with black men. Don't you?" The community answered through trial and punishment, and it was the answer, not the question, that cut the threads that made the rioters feel joined to the community and its laws. Thus the central tragedy of the affair from a reconstructive standpoint was not the material loss associated with the beating and riots, nor the various setbacks to liberty, nor even the miscarriages of justice, but the damage done to three sets of norms and a body of socially necessary emotions: norms of equal citizenship; norms of restraint in the use of state violence; norms of restraint in the use of private violence; and the sense of solidarity between black Americans and the rest of America, particularly between black Americans and the police, the state, and the law.

Now, the Rodney King case is exceptional, to be sure, but what makes it exceptional is mostly a matter of scale. The tens of thousands of typical crimes and punishments that are the bread and butter of criminal law work the same way. Thefts break down norms of property, and punishment rebuilds them. Burglaries deny the security of the home, and punishment affirms it. Domestic violence degrades its victims, and punishment denies their degradation. The measure of success in criminal justice is social solidarity around a shared moral culture; the measure of failure is alienation and normative disintegration.

Reconstructivism is the work of many hands over time, but it is also widely misunderstood—even a lost tradition in criminal theory. The people comprising the reconstructive tradition have not been systematically aware of one another and of their common point of view, and thus have never gotten to the bottom of the view; indeed they have often misunderstood it.<sup>10</sup> The founding figures are Hegel and Durkheim—the one a sociological philosopher, the other a philosophical sociologist, as befits a theory perched at the intersection of those two fields—but many criminal justice

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<sup>10</sup> See Kleinfeld, *Reconstructivism*, *supra* note 1, at 1486–89, 1524–34.

scholars and practitioners who would substantially agree with what Hegel and Durkheim wrote do not think of themselves as Hegelian or Durkheimian. Reconstructivism would be in a stronger position if its adherents were more self-aware and, to that end, I would like here to venture a suggestion: that many criminal justice democratizers are latent reconstructivists. That is not a necessary connection: one could be a democratizer as a matter of criminal justice policy without being a reconstructivist as a matter of criminal justice theory. (A libertarian suspicious of official power might hold that view, for example.) But it is contingently the case that many of those who favor criminal justice reform in a democratic direction also look at criminal law in reconstructivist ways, whether self-consciously or not.

Consider the participants in the present Symposium on democratic criminal justice. The empirical, social scientific work of Tracey Meares,<sup>11</sup> Paul Robinson,<sup>12</sup> and Tom Tyler<sup>13</sup>—research on procedural justice, intuitions about punishment, and legal compliance—focuses on exactly the relationship between community values and criminal justice on which reconstructivism is fixated. Their prediction that where those two diverge, noncompliance will follow, is a contemporary social scientist's version of Durkheim's claims for social solidarity.<sup>14</sup> In addition, Meares's argument that police actions send social messages that can either undermine or support a sense of common, equal citizenship fits exactly into reconstructivism's understanding of crime and punishment as communication oriented to solidarity. Antony Duff's and John Braithwaite's criminal law communitarianism—Duff's philosophical arguments that criminalization, trial, and punishment should express

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<sup>11</sup> See, in this Issue, Tracey Meares, *Policing Procedural Justice: Shaping Citizens' Identities to Increase Democratic Participation*, 111 NW. U. L. REV. 1525 (2017).

<sup>12</sup> See, in this Issue, Paul H. Robinson, *Democratizing Criminal Law: Feasibility, Utility, and the Challenge of Social Change*, 111 NW. U. L. REV. 1565 (2017).

<sup>13</sup> See, in this Issue, Tom R. Tyler, *From Harm Reduction to Community Engagement: Redefining the Goals of American Policing in the Twenty-First Century*, 111 NW. U. L. REV. 1537 (2017).

<sup>14</sup> Durkheim's view was that social solidarity based on shared norms produces compliance, and that fostering such solidarity is the chief purpose of criminal justice: "Thus, the essential function of punishment is not to make the guilty expiate his crime through suffering or to intimidate possible imitators through threats, but to buttress those consciences which violations of a rule can and must necessarily disturb in their faith—even though they themselves aren't aware of it; to show them that this faith continues to be justified . . ." EMILE DURKHEIM, *MORAL EDUCATION* 167 (Everett K. Wilson ed., Everett K. Wilson & Herman Schnurer trans., Free Press 1961) (1925). Or to use the model of classroom discipline, which Durkheim used at the end of his life as a sort of allegory for criminal justice: "With the child as with the adult, moral authority is a creature of opinion and draws all its force from opinion. Consequently, what lends authority to the rule in school is the feeling that the children have for it . . . and everything that might attenuate this feeling, everything that might induce children to believe that it is not really inviolable can scarcely fail to strike discipline at its very source." *Id.* at 165.

society's moral condemnation,<sup>15</sup> and Braithwaite's philosophical arguments that restorative justice should repair fractured relationships<sup>16</sup>—are variations on the Hegelian theme of embodied ethical life. The doctrinal and institutional investigations of Laura Appleman,<sup>17</sup> Stephanos Bibas,<sup>18</sup> Richard Bierschbach,<sup>19</sup> Josh Bowers,<sup>20</sup> and Jocelyn Simonson<sup>21</sup> all center on the idea that contemporary criminal law has, to its detriment, sidelined community voices and values in favor of instrumentally rational bureaucratic agencies, and that criminal law can only play its proper part in the social world if it is governed in more community-oriented ways. These are ideas for which reconstructivism provides theoretical foundations. They are also ideas that characterize the work of Bill Stuntz, who was, I submit, both a reconstructivist and a democratizer, though he died before the labels came into use.<sup>22</sup> He is an intellectual father to many of us in the democratization movement and surely would have joined our efforts had he only lived a little longer. Finally, one important feature of Dorothy Roberts's,<sup>23</sup> Jonathan Simon's,<sup>24</sup> Jocelyn Simonson's,<sup>25</sup> and, again Tracey

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<sup>15</sup> See, in this Issue, R A Duff, *A Criminal Law We Can Call Our Own?*, 111 NW. U. L. REV. 1491 (2017).

<sup>16</sup> See, in this Issue, John Braithwaite, *Criminal Justice that Revives Republican Democracy*, 111 NW. U. L. REV. 1507 (2017).

<sup>17</sup> See, in this Issue, Laura I Appleman, *Local Democracy, Community Adjudication, and Criminal Justice*, 111 NW. U. L. REV. 1413 (2017).

<sup>18</sup> See, in this Issue, Stephanos Bibas, *Restoring Democratic Moral Judgment Within Bureaucratic Criminal Justice*, 111 NW. U. L. REV. 1677 (2017).

<sup>19</sup> See, in this Issue, Richard A. Bierschbach, *Fragmentation and Democracy in the Constitutional Law of Punishment*, 111 NW. U. L. REV. 1437 (2017).

<sup>20</sup> See, in this Issue, Josh Bowers, *Upside-Down Juries*, 111 NW. U. L. REV. 1655 (2017).

<sup>21</sup> See, in this Issue, Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609 (2017).

<sup>22</sup> Consider, for example, Stuntz's arguments that the cause of American criminal justice's severity is not chiefly voters' harshness but prosecutors' incentives; that common law *mens rea* standards, because of their moralistic and open-ended character, open up a necessary space for nontechnical argumentation about culpability and equity in criminal justice trials; that criminal justice should generally be in the hands of local neighborhoods; that, in particular, prosecutors should be elected from highly local community units like neighborhoods rather than from large counties; that it is juries' role to use the power of nullification to exercise mercy and keep state officials in line; that criminal law's expressive qualities are key to its proper functioning; that one of the problems with excessive criminalization is the diminishment of that expressive function; and that alienation is key to the crime/race problem. WILLIAM J. STUNTZ & JOSEPH L. HOFFMAN, *DEFINING CRIMES* 104, 181–82, 190–201 (2011); WILLIAM J. STUNTZ, *THE COLLAPSE OF CRIMINAL JUSTICE* 283–87, 305–07 (2011); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 520–23 (2001).

<sup>23</sup> See, in this Issue, Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597 (2017).

<sup>24</sup> See, in this Issue, Jonathan Simon, *Racing Abnormality, Normalizing Race: The Origins of America's Peculiar Carceral State and Its Prospects for Democratic Transformation Today*, 111 NW. U. L. REV. 1625 (2017).

Meares's<sup>26</sup> arguments about racial justice is the recognition of criminal law's capacity to transmit social messages that risk fracturing communities along racial lines—a capacity and a risk that reconstructivism highlights. Now, this Symposium is about democratization, not reconstructivism; the people gathered for it were chosen for their democratic policy commitments, not their latent theoretical views. But many democratizers in criminal justice are in fact latent reconstructivists. The link between democratic and reconstructive ideas is so strong that when people take hold of one it tends to pull them toward the other.

## II. RECONSTRUCTIVISM AND DEMOCRACY

Why is that link so strong? What exactly is the connection between reconstructive and democratic ideas? To see the answer, we need to consider strands of democratic theory that treasure ethical life as reconstructivism does—that see democracy in terms of a community's capacity to form its culture in conditions of deliberative freedom and to project the culture thus formed into political life. For purposes of fixing concepts, it is useful to contrast three types of democratic theory: those that see democracy exclusively in terms of governmental processes (e.g., voting in elections, representative institutions, parliamentary supremacy, checks and balances);<sup>27</sup> those that see democracy in terms of advancing liberal values (e.g., equality, liberty, individual rights);<sup>28</sup> and those that see democracy in terms of collective self-determination, popular sovereignty, and self-government, and therefore focus on whether the views of the people who make up the political community are reflected in their law (e.g., majoritarianism, communitarianism, certain types of republicanism).<sup>29</sup> One need not see these three as competitors; they might be complements,

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<sup>25</sup> See, in this Issue, Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609 (2017).

<sup>26</sup> See, in this Issue, Meares, *supra* note 11.

<sup>27</sup> See, e.g., JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 241 (Routledge 2010) (1942) (“[T]he democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote.”).

<sup>28</sup> See, e.g., PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* ix, 7–8 (1997) (defining republican democracy as a system of government based on “freedom as non-domination,” and, in a move that is unusual only for its candor, openly disavowing any close association between democracy and majority rule).

<sup>29</sup> See, e.g., Robert Post, *Democracy and Equality*, 603 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 25–26 (2006) (rejecting a conception of democracy in terms of liberal values and insisting that, even if democracy is not identical to majoritarian voting procedures, democracy must nonetheless consist in some form of collective self-determination).

highlighting different facets of democracy (surely a multifaceted thing).<sup>30</sup> And the list is not exhaustive. I draw the contrast only because it is helpful for understanding the sense in which reconstructivism is democratic. Reconstructivism's democratic character is not a matter of purely governmental processes or liberal values (the first and second type of theory or facet of democracy), but of the way in which reconstructivism prizes the views and values of the people who make up the political community—that is, the way in which reconstructivism relates to the ideal of popular sovereignty and self-government embedded in the ideal, “We the People.”

The central thought is this: in a democratic society, law and other exercises of governmental power should reflect and respond to the ethical life of the people living under that law and government. By “ethical life,” I mean the values disclosed by a community's public deliberations or implicit in its social practices and institutions, provided those deliberations, practices, and institutions reflect or were formed in reasonably non-oppressive conditions. The proviso is not ad hoc. For a community's ethical life to have *democratic* authority, that ethical life must be consistent with the premise that the people who comprise society should command its law. That premise necessarily excludes forms of ethical life based on one portion of society oppressing, manipulating, denying equal citizenship to, or otherwise dominating another portion of society. Democratic ethical life is thus necessarily limited to moral cultures formed in reasonably free and equal conditions. Whether this condition is enough to exclude from consideration all communities with unjust cultures is an open question, but it excludes a great many of them, and I think it authorizes us to focus the inquiry here on the ethical lives of communities that, if not perfectly just, are at least reasonably decent. My claim, then, is that a decent community's ethical life should command a measure of political authority in democratic societies because part of what collective self-determination means is that a

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<sup>30</sup> My own view is that democracy is multifaceted and all three of these types of democratic theory, which do not contradict one another, are true in part. That is, I think majoritarian electoral processes of the kind Schumpeter describes, *supra* note 27, are an indispensable minimum in any large democratic country, both as a matter of definition (using the term “democracy” in a way that makes sense of ordinary language) and as a matter of securing one of democracy's great benefits: protecting the citizenry's capacity to protect itself against abusive leadership. I also think democracy implies a set of substantive liberal values: for example, to give each person one vote, and no more, is to affirm the equality and dignity of the members of the political community. (A majority vote to remove voting rights from a minority of the population would be undemocratic even if electorally approved.) And I also think that majoritarian electoral processes and liberal rights are, although necessary, insufficient for democratic government, because a society is not fully democratic if the members of the political community cannot participate in fashioning the law under which they live—law that reflects their values and views.

political community can see its norms reflected in its laws. I do not claim that this is the sum of democracy, but it is a facet of democracy, and what I would like to do in the paragraphs that follow is explain why this facet of democracy matters and connect it to democratic theory.

The problem that motivates this discussion is the problem presented when political power in a society is exercised in ways that are grossly inconsistent with the way in which that society's people lead their lives and consider it right to lead their lives—that is, the democratic problem presented when *law* and *culture* become disconnected. The situation arises most vividly in the context of colonial rule, where the law is potentially alienating because it is literally alien to the culture it governs: British law in colonized India sometimes had this character. The law emanated from a different culture and even when it was a step forward in terms of liberal values, it was a step back in terms of self-determination, because there was no sense in which the Indian people could rationally see the law as their own. The situation can also arise when a splinter group within a society gets control of the government, as in contemporary Iran. But we need not look so far afield: one of the odd problems of contemporary American criminal law is how often we criminalize in ways inconsistent with normal social practice. In California, for example, the age of sexual consent is eighteen and, while there is a reduction in charge where the perpetrator and victim are close in age, it is nonetheless criminal for two unmarried teenagers under the age of eighteen to have sex; each party counts as both victim and perpetrator.<sup>31</sup> Yet the average American, and presumably the average Californian, loses his or her virginity at age seventeen.<sup>32</sup> Outside my office in Chicago, there is an eight-lane divided highway that is one of the city's major north-south arteries. Naturally, people drive fifty to seventy miles per hour on that highway, but the posted speed limit along its entire length is forty miles per hour, which means that virtually every driver on the road is committing a moving violation, and anyone driving over sixty-five miles per hour is guilty of a misdemeanor.<sup>33</sup> Federal criminal law in the United States makes sharing videos or music under broadly defined circumstances a felony carrying a multi-year prison term,<sup>34</sup> but 70% of Americans aged 18–29 and 46% of all Americans have illegally copied or downloaded videos or music, and only 12% of all Americans

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<sup>31</sup> CAL. PENAL CODE § 261.5 (West 2014).

<sup>32</sup> *Key Statistics From the National Survey of Family Growth*, CTRS. FOR DISEASE CONTROL & PREVENTION, [https://www.cdc.gov/nchs/nsfg/key\\_statistics/s.htm#sexualactivity](https://www.cdc.gov/nchs/nsfg/key_statistics/s.htm#sexualactivity) [<https://perma.cc/K8LW-3W6J>].

<sup>33</sup> See 625 ILL. COMP. STAT. 5/11-601.5 (2016).

<sup>34</sup> See 17 U.S.C. § 506 (2012); 18 U.S.C. § 2319 (2012).

think such copying or downloading should be punishable with imprisonment.<sup>35</sup> The examples could be multiplied. Why American government, despite a system of elected representatives, establishes such laws is an interesting question to ponder: surely the influence of powerful lobbies is one reason (particularly in the copyright case), and police and prosecutors' enforcement discretion is another (enforcement discretion, as Stuntz has argued, gives officials at multiple levels of government incentives to broaden criminal law).<sup>36</sup> But my goal here is not to unpack the political structures that bring these laws about. My goal here is to vindicate the intuition that, although these laws were established by elected representatives, they are nonetheless undemocratic in the normative sense that the law is inconsistent with the ethical life of the people living under it.<sup>37</sup>

The first step is to notice some of the tributary streams of thought that make up the third type of democratic theory touched on above—that is, the understanding of democracy in terms of collective self-determination, popular sovereignty, and self-government. My *Manifesto of Democratic Criminal Justice* earlier in this Symposium focuses exactly on these streams of thought.<sup>38</sup> From Max Weber, the *Manifesto* builds a conception of democracy as *anti-bureaucratic*, that is, resistant to rule by a professional corps of officials and experts exercising the rule-based and instrumental modes of reasoning characteristic of bureaucratic governance. In democracies, the lay citizenry, exercising its characteristically equitable and value rational modes of reasoning, directs the bureaucracy. From Jürgen Habermas, the *Manifesto* builds a conception of democracy as *deliberative*, that is, a structure of government in which citizens deliberate in conditions of freedom on matters of public concern, form (however imperfectly) a democratic opinion or general will on those matters, and have the capacity to make government heed that democratic opinion or general will. From Alexis de Tocqueville, the *Manifesto* builds a conception of democracy as *participatory*, that is, a structure of government in which citizens sometimes take the reins of government

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<sup>35</sup> JOE KARAGANIS & LENNART RENKEMA, AM. ASSEMBLY COLUMBIA UNIV., COPY CULTURE IN THE US & GERMANY 30–31, 40–41 (2013), <http://piracy.americanassembly.org/wp-content/uploads/2013/01/Copy-Culture.pdf> [<https://perma.cc/L6TM-6KR7>].

<sup>36</sup> Stuntz, *Pathological Politics*, *supra* note 22, at 528.

<sup>37</sup> In *Reconstructivism*, after touching on this theme, I stated that “[w]orking out the metes and bounds of reconstructivism’s democratic claims would be a large project,” better saved for a separate article. Kleinfeld, *Reconstructivism*, *supra* note 1, at 1555. This is that separate article. The political theory in this Part is one aspect of working out reconstructivism’s democratic metes and bounds; the three principles in the next Part are another.

<sup>38</sup> Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367 (2017).

themselves, engaging in direct self-government (as with jury service) or forms of popular majoritarianism that are just one remove from direct self-government. What these three bodies of thought have in common is, first, an insistence that democracy means something more than merely electing rulers (even “representative” rulers) and, second, a refusal to substitute a substantive conception of justice or substantive set of liberal values for the democratic project of self-rule. Rather, anti-bureaucratic, deliberative, and participatory theory all take seriously the ideal of a sovereign people governing itself—of government “by” and “of” the people. All three types of theory center on the view that, for a society to be fully democratic, the exercise of political power within that society must be closely linked to “We the People.”

This is clearly the appropriate *context* for the idea I’m advancing here—the idea that, in a democratic society, the exercise of political power must reflect the citizenry’s ethical life. But the *Manifesto*’s development of the concept of democracy was designed to fit everyone in the movement to democratize criminal justice, not just reconstructivists, and the popular sovereignty-oriented vein of democratic theory that the *Manifesto* mines, while certainly applicable to a theory of democracy in terms of ethical life, is not directly *about* ethical life. Reconstructivism’s democratic demands are more specific than those suggested by anti-bureaucratic, participatory, and conventional forms of deliberative democratic theory. Reconstructivism is specifically about the link between *culture* and *government*. Our quarry is a form of democratic theory that highlights the place of culture in understanding what democracy is and why democracy matters. Such a theory would be a *subcategory* of the popular sovereignty vein of democratic thought, alongside or within anti-bureaucratic, deliberative, or participatory veins of democratic thought. What I’d like to suggest here is that the raw materials from which to fashion this sort of culturally oriented form of democratic theory are already available in the deliberative tradition, and a handful of democratic theorists with communitarian leanings have begun to mine those raw materials.

Deliberative theory has a certain standard structure. As I write in the *Manifesto*, “[d]eliberative democracy focuses on the importance, in any political community that aspires to be truly democratic, of free and equal citizens within the community deliberating on matters of shared political concern.”<sup>39</sup> Deliberative theory thus envisions a sphere of communication *prior* to majoritarian decisionmaking—Habermas speaks of it in terms of

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<sup>39</sup> *Id.* at 1385.

the “lifeworld” and “public sphere”<sup>40</sup>—within which, through deliberation, citizens form a democratic will. They then impress their will upon the law, and, because the law is made from their views, thereby rule themselves. The orienting ideal is one of authorship: “where the community makes the law out of its own convictions, the community can truly be seen as self-governing; the people can rationally see themselves as the law’s author.”<sup>41</sup> This sounds very close to the idea of fashioning law on the basis of culture or ethical life. But not all is as it seems. Mainstream deliberative democracy, particularly in the Habermasian tradition, has a strongly rationalizing orientation. Theorists in this vein insist that the exercise of political power must be based, not on actual deliberation followed by a fair vote, but on a hypothetical consensus that would presumptively follow from a fully rational deliberative process.<sup>42</sup> The game then becomes one of specifying the relevant idealizing conditions.<sup>43</sup> Developed in this way, deliberative democratic theory becomes almost the antithesis of a conception of democracy in terms of culture or ethical life—or, indeed, of any popular sovereignty-oriented conception of democracy. It becomes a tool by which to condemn real deliberation and real cultures for not being rational enough (not living up to the idealizing conditions), and thus, ironically, to delegitimize real majorities for not being democratic enough. Democracy becomes the rule of what the theorist imagines to be the best reasons rather than the rule of the people.

I think this shift in deliberative democratic theory from actual self-government to a hypothetical consensus based on perfect rationality is a mistake of the first order.<sup>44</sup> But it need not detain us. The underlying ideas

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<sup>40</sup> *Id.* at 1388–89, 1389 n.73.

<sup>41</sup> *Id.* at 1385.

<sup>42</sup> See JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 107, 110 (William Rehg trans., MIT Press 1996) (1992) (holding that “[j]ust those action norms are valid to which all possibly affected persons could agree as participants in rational discourses” and that “only those statutes may claim legitimacy that can meet with the assent . . . of all citizens”).

<sup>43</sup> See, e.g., AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 7 (1996) (presenting, over the course of three chapters, “the kinds of reasons that should be given, the forum in which they should be given, and the agents to whom and by whom they should be given” in properly constituted deliberative conditions).

<sup>44</sup> Nicholas Wolterstorff expresses my view exactly:

Rationality does not typically yield consensus. Rationality coupled with information typically leaves us disagreeing with each other. . . . [But] [t]here is, after all, a perfectly familiar, and to my mind admirable, procedure in liberal democracies for reaching a decision on some political issue when we find ourselves still disagreeing after we have debated—as we almost always do. We take a vote. In Rorty, Rawls, Audi, Larmore, and their cohorts, there is an implicit dislike for a procedure that I regard as belonging to the very essence of a democracy, namely, voting. . . . It’s my view that it is the genius of liberal democracy to guarantee certain basic

of deliberative democracy—the idea of a communicatively constituted lifeworld and public sphere, the idea of deliberation giving rise to democratic opinion that in turn determines government, and above all the authorial ideal of law that is a community’s own because it reflects the community’s own views and values—are not married to the rationalist program. In fact, they are precisely the equipment we need to understand why democratic law must reflect a community’s ethical life.

Two moves are key. The first is to see that democratic opinion- and will-formation do not and cannot proceed from some separate sphere of political discourse hived off from the rest of culture. The communicatively constituted lifeworld and public sphere in which democratic opinion- and will-formation take place essentially *are* a community’s culture. The opinions and will that emerge from that culture partake of rationalistic forms of argument but come from many other sources as well, and are better—sounder, more protected from rationalism’s excesses, more sensitive to and honest about human realities, more habitable—because of the complexity of that mixture. Indeed, the lifeworld and public sphere properly understood consist not only in discourse but also in value-bearing social practices and institutions. Much of a society’s evolved wisdom manifests, not in rationalistic forms of argument, but in these value-bearing social practices and institutions. Baseball, jazz music, and premarital sex are all part of the lifeworld and public sphere from which democracy is made. Furthermore, the lifeworld and public sphere cannot be limited to expressly political matters because “politics” can potentially be anything and because the inputs into politics can potentially come from anywhere. The use of steroids in baseball can become a political issue, and when it does, the set of cultural experiences, images, and values associated with competitive sports become part of democratic opinion- and will-formation. In other words, political issues in democratic societies are not just a matter of narrowly rationalistic political argumentation but of who we are and want to be as a society—a matter of our ethical life.<sup>45</sup>

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rights and liberties to its citizens and resident aliens, and to assure access by all normal adults to fair voting procedures.

NICHOLAS WOLTERSTORFF, UNDERSTANDING LIBERAL DEMOCRACY 25, 49–50 (Terence Cuneo ed., 2012). I also discuss this issue in the *Manifesto*. Kleinfeld, *Manifesto*, *supra* note 38, at 1386 & nn.63–64.

<sup>45</sup> Habermas recognizes and criticizes the view I am defending. Some “contemporary republicans,” he writes, give “public communication a communitarian reading” and thus look at politics in terms of explicating “a shared form of life or collective identity” and treat political questions as “ethical questions where we, as members of a community, ask ourselves who we are and who we would like to be.” Jürgen Habermas, *Three Normative Models of Democracy*, 1 CONSTELLATIONS 1, 4 (1994). He objects because he thinks these ethical questions are “subordinate to moral questions . . . in the narrow

The second key move is to see that the authorial ideal (the ideal of a political community that can rationally see itself as the author of its own law) extends simply by the terms of its own logic to the idea that a community's ethical life must be reflected in its law. The authorial ideal captures perfectly what goes wrong when law becomes radically disconnected from culture, as in colonized India under British rule, contemporary Iran under theocratic rule, or in the bizarre array of American laws that make ordinary patterns of American life criminal. Such law is undemocratic because it is not rationally possible for the people living under it to see themselves as the author of law that violates the people's own way of life.

We thus come to a modified version of deliberative democracy in which the central idea is that democracy requires giving each person a fair opportunity to contribute to a *culture* and then submitting the exercise of governmental power to the culture thus formed. Robert Post is one of the handful of theorists developing deliberative ideas along these lines. Borrowing a distinction of Norberto Bobbio's between *autonomy* (etymologically "self-law") and *heteronomy* ("other-law"), Post argues that democratic forms of government are those "in which the laws are made by the same people to whom they apply (and for that reason they are autonomous norms), while in autocratic forms of government the law-makers are different from those to whom the laws are addressed (and are therefore heteronomous norms)."<sup>46</sup> Post therefore asks after the conditions in which law is truly made autonomously—"what it means for a people to engage in the practice of self-determination."<sup>47</sup> Concluding that majoritarian voting procedures are not sufficient,<sup>48</sup> he defends deliberative democracy's traditional solution: the authorial ideal. The crucial thing is that the people, through deliberation, form a general will that is democratic insofar as individual citizens can, on rational grounds, "recognize in that

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sense of the Kantian tradition," that is, "questions of justice." *Id.* at 5. But I wonder if the real root of our disagreement has less to do with our views about the relative priority (and severability) of moral questions and ethical ones than with his faith, which seems to me so utterly excessive, in rationalistic forms of argument.

<sup>46</sup> Post, *supra* note 29, at 25–26 (quoting NORBERTO BOBBIO, *DEMOCRACY AND DICTATORSHIP: THE NATURE AND LIMITS OF STATE POWER* 137 (Peter Kennealy trans., Univ. of Minn. Press 1989) (1978)).

<sup>47</sup> *Id.*

<sup>48</sup> I wish Post had written that majoritarian voting procedures are *necessary* but not sufficient. As discussed *supra* note 30, I think democracy is multifaceted and I worry that democratic theorists tend to drift from the (true) proposition that voting is not everything to the (false and extremely dangerous) proposition that voting does not matter, or does not matter very much. But Post is ambiguous on the matter. See Post, *supra* note 29, at 25.

general will the potentiality of their own authorship.”<sup>49</sup> Citizens must be able to rationally “experience their government as their own,” to “recogniz[e] particular decisions as [their] own,” and to “have the warranted conviction that they are engaged in the process of governing themselves.”<sup>50</sup>

But then, rather than veering into either Habermasian rationalism or Rousseauian mysticism,<sup>51</sup> Post turns to culture. For the people to have the warranted conviction that they are governing themselves, the state’s process for making decisions must be “responsive to [the people’s] own values and ideas.”<sup>52</sup> Participants in the process must, as he continuously stresses, not have an “alienated” relationship to the law.<sup>53</sup> The process must be at once individualistic and communitarian: individualistic so that “independent citizens” can “fashion their social order in a manner that reflects their values and commitments”<sup>54</sup> and communitarian because the socialization processes necessary to create independent citizens require “healthy and vigorous forms of community life.”<sup>55</sup> Speech about matters of public and private concern cannot be distinguished in this process “because democratic self-governance posits that the people control the agenda of government. They have the power to determine the content of public issues simply by the direction of their interests.”<sup>56</sup> Finally, the goal of the deliberative process is “collective self-definition,” which must “precede and inform government decision making.”<sup>57</sup> For Post, deliberative democracy is a chain with two links: from individuals to culture, and from culture to government. Individuals project their moral authority as members of the community into their culture, and government bows to the authority of the culture thus formed.

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<sup>49</sup> Post, *supra* note 29, at 27–28.

<sup>50</sup> *Id.* at 25–27.

<sup>51</sup> The allusion is to Jean-Jacques Rousseau’s famous presentation of how individual wills combine to form a general will, which, though a foundation stone in the deliberative tradition, seems to me so exaggerated as to be at once metaphysically implausible and, paradoxically, anti-democratic: “If, then, we eliminate from the social pact everything that is not essential to it, we find it comes down to this: Each one of us puts into the community his person and all his powers under the supreme direction of the general will; and as a body, we incorporate every member as an indivisible part of the whole.” JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 61 (Maurice Cranston trans., Penguin Books 1968) (1762) (internal quotation marks omitted).

<sup>52</sup> Post, *supra* note 29, at 27.

<sup>53</sup> *Id.* at 26–27, 29.

<sup>54</sup> Robert C. Post, *Between Democracy and Community: The Legal Constitution of Social Form*, in *DEMOCRATIC COMMUNITY* 163, 173 (John W. Chapman & Ian Shapiro, eds., 1993).

<sup>55</sup> *Id.* at 176–78.

<sup>56</sup> *Id.* at 181.

<sup>57</sup> *Id.* at 180.

Post is a constitutional law scholar and writes that his deliberative, authorial, and cultural understanding of democracy reflects “the theory of the American First Amendment, which rests on the idea that if citizens are free to participate in the formation of public opinion, and if the decisions of the state are made responsive to public opinion, citizens will be able to experience their government as their own.”<sup>58</sup> This culturally oriented version of deliberative democracy also flourishes in the theory of copyright law, for, like the First Amendment, copyright law provides a legal framework for cultural exchange. Yochai Benkler, for example, argues on grounds of “democratic participation” that law should protect individuals’ ability “to participate in the creation of the cultural meaning of the world they occupy.”<sup>59</sup> And Jack Balkin—both a constitutional and a copyright scholar—argues that human beings are by nature cultural creatures, whose interest in “the development of the ideas and meanings that constitute them and the communities and subcommunities to which they belong” not only includes the political interest in “public deliberation about issues of public concern” but extends to the very roots of human flourishing.<sup>60</sup> Thus, Balkin argues, free speech protects individuals’ right “to participate in the production of culture” and protects the cultural sphere itself from domination, ensuring that we do not live solely within a culture others make for us but instead enjoy “a democratic culture.”<sup>61</sup> Perhaps it is unsurprising that, where pure philosophers have fallen prey to a rationalistic form of deliberative democracy, American legal scholars with philosophical leanings have begun to uncover a version of deliberative democracy consistent with the American constitutional tradition, and therefore both oriented to “We the People” and attuned to the political influence of culture in any society grounded in “We the People.”

In sum, then, the link between democracy and reconstructivism is this: reconstructivism’s central claim is that criminal law has a distinctive role to

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<sup>58</sup> Post, *supra* note 29, at 27; *see also* *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988) (explicitly associating the First Amendment with protecting “public discourse”); *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940) (protecting Jehovah’s Witnesses in distributing religious material because “[t]he essential characteristic of these [First Amendment] liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed”); *Stromberg v. California*, 283 U.S. 359, 369 (1931) (striking down a law that banned communist flags on the grounds that “[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people . . . is a fundamental principle of our constitutional system”).

<sup>59</sup> YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 285 (2006).

<sup>60</sup> Jack M. Balkin, Commentary, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 4–5, 34 (2004).

<sup>61</sup> *Id.* at 4.

play in the social world such that, in the vast majority of cases, it is right for legal doctrine, governmental practice, and the officials and institutions that comprise the criminal system to submit to the moral culture of the community wherein they are situated. That is, reconstructivism insists on the moral authority of a community's ethical life in the context of criminal law. There is a strain of democratic theory that sees the value of democracy itself in such terms—a view for which the normative core of democracy has to do with a community's ability to rationally see itself as the law's author. On this view, democratic government is just the echo in politics of a self-defining culture. Reconstructivism is the conception of criminal law appropriate to such a conception of democracy. What makes it democratic is that it treasures ethical life, subordinates criminal law to ethical life, and sees criminal law's task in terms of the service it does for ethical life.

### III. THREE PRINCIPLES

What would a democratic–reconstructive system of criminal law look like? The concept of democracy as community self-authorship is quite abstract, as is the concept of criminal justice as normative reconstruction. In order to connect these sweeping ideas to concrete policy interventions, we need an intermediate level of theory, a set of mid-level principles that connect in relatively direct ways to the everyday stuff of legal doctrine, practice, and institutional design.

Normative criminal theory as a field can be, I submit, divided into three parts: the theory of criminalization (what conduct should constitute a crime?); the theory of punishment (what principles should guide the type and extent of punishment meted out for crimes?); and the theory of criminal procedure (what principles should guide the administration and enforcement of criminal law?). The theory of punishment has received such disproportionate attention that it is sometimes confused with the field as a whole—as if “punishment theory” and “criminal theory” were the same thing—but these three branches are in fact distinct. If a theory of criminal justice aspires to be complete or comprehensive, as reconstructivism does, it must speak to each of them. And it is at the level of these three branches that policy-guiding principles can be seen.

I would therefore like to propose three principles, each entailed by democratic–reconstructivism, one to govern each of the three branches of the field: the moral culture principle of criminalization, the principle of prosocial punishment, and the “We the People” principle of criminal procedure.

*A. The Moral Culture Principle of Criminalization*

The moral culture principle of criminalization holds that the only conduct that may justly be criminalized is conduct that violates and expressively attacks the values on which a community's social organization is based, unless the merits of criminalizing another type of conduct are so great as to substantially outweigh the harm criminalizing it does to those same community values.

The moral culture principle thus has both an affirmative, justificatory dimension and a negative, prohibitory dimension, neither of which is wholly mandatory. To start on the affirmative side, note that the moral culture principle indicates (albeit by suggestion) what forms of criminalization we might *favor*: we have good reason to criminalize where doing so hinders a hindrance to the values undergirding the social order.<sup>62</sup> After all, a good theory of criminalization should favor criminalizing something, and most uncontroversially criminal conduct fits the description of an attack on the values undergirding the social order: as mentioned above, thefts attack norms of property, burglaries deny the security of the home, domestic violence attacks victims' physical integrity and equality. But the principle does not *require* criminalizing every attack on shared norms because it recognizes that our good reasons to criminalize may be overridden by other values. The conduct in question may be minor or private in ways a free society should overlook, or crucially, the challenge to the established order may be part of the deliberative process by which society can or should change. In particular, a great deal of speech, assembly, and religious heterodoxy attacks the normative order of society in ways necessary for a free society to grow. The First Amendment can usefully be understood as an anti-criminalization provision—indeed, historically it has often functioned as an anti-criminalization provision—freeing up a sphere of normative challenge and norm entrepreneurship outside the reach of criminal law. Furthermore, in the United States, tolerating speech that challenges shared moral culture is, paradoxically, part of shared moral culture. Crafted under the sign of deliberative democracy, the moral culture principle does not criminalize in this sphere.

In its negative, prohibitory dimension, the moral culture principle *protects* conduct from criminalization where that conduct is *part* of a community's way of life. Going to school, getting a job, getting a drink, playing a sport—these things cannot be criminalized in our culture because

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<sup>62</sup> I am cribbing Kant's phrase that we should coerce only as a "hindering of a hindrance to freedom." IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 6:231, at 25 (Mary Gregor ed. & trans., Cambridge Univ. Press 1996) (1797) (emphasis omitted).

they are part of what our ethical life consists in. To do otherwise, to criminalize elements of ethical life itself, would contradict the very purpose for which criminal law exists. Yet due to the “unless” clause, this prohibitory part of the principle may be overridden too: it is a strong but defeasible presumption, not an absolute. As discussed at length in other work, I think there are situations so extreme that criminalizing in the face of a recalcitrant culture makes sense even on reconstructive grounds.<sup>63</sup> Reconstructive theory is finally grounded in human flourishing and thus has the wherewithal without internal inconsistency to acknowledge situations in which preserving moral culture is itself contrary to human flourishing. As the “unless” clause also highlights, however, even in such cases one must recognize the costs such criminalization exacts in the currency of social solidarity.

Taken together, these positive and negative elements of the moral culture principle would make the conduct labeled “crime” truly—by its very nature—*antisocial*. That term can sound almost quaint in contemporary ears, but that is only because contemporary patterns of criminalization have drifted so very far from what crime, on a reconstructivist view, should be. Our criminal legislation at present reflects no principle but that crime is whatever the legislature says it is—a principle of pure positivism based on a view of the criminal instrument in terms of pure expediency. One way of understanding the moral culture principle is to see it as holding that criminal law should almost never be purely positivistic. Criminal law should be codified customary law. If it is custom in the community to drive sixty miles per hour on the highway, then it cannot justly be made a crime to drive over forty miles per hour. If it is custom in the community for friends to smoke marijuana together, then smoking marijuana should at most be the subject of civil or administrative control, not criminal. If the community has not arrived at a functional consensus that taking copyright-protected (but nonrival) intellectual property is the moral equivalent of theft, then copyright felonies should not exist. The principle is radical insofar as it profoundly departs from current practice, but it is conservative in the Burkean sense that it defers to the evolved wisdom embedded in the practices of a functioning society. What is genuinely radical in contemporary American criminal law (but hard to see because it is so close) is how instrumental our ways of using the

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<sup>63</sup> Kleinfeld, *Reconstructivism*, *supra* note 1, at 1560–61 (terming this stance of restraint, of not using the criminal instrument against a community’s ethical life except in extreme cases, “criminal law Thayerianism” based on James Bradley Thayer’s view of judicial review: strike down a statute only if its unconstitutionality is “so clear that it is not open to rational question” (quoting James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893))).

criminal law have become—how readily we have set aside the tradition of restricting criminal law to widely recognized and highly culpable wrongdoing and come to accept patterns of expanding criminalization for no better reason than that criminal law is a useful tool for social control that can be enlisted against anything we wish to curb. Burke is radical in a Benthamite world. The moral culture principle insists that criminal law is generally the wrong instrument to put at the front of cultural change, and it points criminal law away from purely instrumental uses, away from the project of sheer social control, toward the more cautious project of cultural maintenance.

The moral culture principle is thus meant to compete with a utilitarian and positivistic principle of criminalization based on pure expediency. It is also meant to compete with the most visible alternative to utilitarian expediency in the discourse on criminalization, that is, John Stuart Mill's harm principle: "[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."<sup>64</sup> The harm principle is not democratic at all; it is liberal in a libertarian sense. Imagine a society in which selling organs clearly would attack and threaten the social order—by suggesting that the body is nonsacred, for example, or that the bodies of the poor are for sale to the rich. The harm principle in that society would refuse to criminalize provided the transaction were consensual. Imagine another society in which selling organs were taken to attack and threaten the social order in some cases and not others—perhaps when the organs in question would cost the seller his or her life, but not otherwise. The harm principle would still refuse to criminalize; the differences between societies one and two just wouldn't matter, because the views of the people comprising those societies wouldn't matter. Imagine a third society in which the extant values were sufficiently individualistic and market-oriented that it would be no threat to society's values to buy and sell organs at will. The harm principle there would contingently be consistent with the values of the people within that society, but the fact that people held those views still wouldn't matter. As long as "harm" carries its ordinary meaning, the harm principle is *incapable* of responding to the convictions of the people whose criminal law it aspires to direct. This indifference is improper. It is undemocratic; it hinders experimentation and social discovery (woe be to the community saddled with the harm principle if, empirically, the principle turns out to have bad effects); and it disables criminal law's

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<sup>64</sup> JOHN STUART MILL, ON LIBERTY 80 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859). Note that Mill's followers have developed this principle in a more rigidly libertarian, less culturally oriented way than Mill himself does in *On Liberty*.

capacity to accomplish an essential social function, namely, reconstructing a violated normative order. I also think, though this would require a much more extensive argument, that the harm principle's policy implications are often unsound. Celebrated as it is, the harm principle is not the answer to overcriminalization.

The moral culture principle is thus a third way—a principled justification for and constraint on criminalization that is not utilitarian, that is not the harm principle, and that is consistent with the democratic goal of enabling the community to rationally see itself as the author of its laws.

### B. *The Principle of Prosocial Punishment*

The principle of prosocial punishment holds that criminal punishment should aim, both expressively and functionally, to protect, repair, and reconstruct the normative order violated by a crime while at the same time minimizing the damage to the normative order caused by punishment itself.

The prosocial punishment principle has a great deal in common with the relatively familiar expressive conception of punishment. Like the expressive conception of punishment, the prosocial punishment principle centrally includes using the expressive qualities of punishment to condemn a crime, affirm the social norm violated by the crime, and affirm the dignity of any victim or victims of the crime. But the principle of prosocial punishment carries a different range of implications than the expressive conception of punishment, for two reasons.

First, while the expressive conception of punishment merely notes that punishment has expressive qualities and uses those qualities to send condemnatory messages, the principle of prosocial punishment wields punishment's expressive qualities in the service of a distinctive and well-defined goal: reconstructing ethical life.<sup>65</sup> This goal makes the principle of prosocial punishment sensitive to something merely expressive punishment is not, namely, the ways in which punishment itself might send messages that tear the social fabric. Consider the effect on society's normative order of torturing offenders as a form of punishment. The ordinary objection is that torture violates the human rights of the offender. Reconstructivism

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<sup>65</sup> In *Reconstructivism*, I argue that expressivism

is so thin that it is not really a comprehensive theory of punishment or criminal law at all. . . . One could be both an expressivist and a liberal utilitarian . . . . One could also be both an expressivist and a retributivist . . . . This mixing and matching is not theoretical confusion: it results from the fact that expressivism without further specification makes no claims about the ultimate grounds of punishment, whether justice, welfare, or whatever else. Expressivism is a building block to be used in various theories of punishment as appropriate.

Kleinfeld, *Reconstructivism*, *supra* note 1, at 1533.

observes that torturing an offender would also have collateral effects on the prevailing moral culture. A community that tortures as punishment is one in which a set of Enlightenment humanist values related to the infliction of pain will be unable to take hold of the culture or will lose their cultural grip. Torturing thieves, for example, might succeed in affirming society's commitment to property rights, but in so doing it would undermine a series of collateral values that are also necessary to maintaining social life. Torturing thieves would also damage the *emotional* basis of social life, especially if anyone in the society loves the offender or cares about others like the offender.

In pointing out the ways in which punishment itself might send messages that damage the social fabric, the principle of prosocial punishment gets at something that I think is quite fundamental to understanding what has gone wrong in American criminal punishment today. As I have argued at length in past work:

Implicit in American punishment is the idea that serious or repeat offenses mark the offenders as morally deformed people rather than ordinary people who have committed crimes. Offenders' criminality is thus both immutable and devaluing: it is a feature of the actor, rather than merely the act, and, as such, it diminishes offenders' claim to membership in the community and loosens offenders' grip on certain basic rights.<sup>66</sup>

That is a profoundly antisocial message.<sup>67</sup> Notice the irony: it is *crime* that is supposed to be antisocial. The principle of prosocial punishment is fundamentally just that: the claim that punishment should be *prosocial*—that punishment should truly be crime's antithesis. That is the logic of the call-and-response that is crime and punishment on a reconstructive view. It is all but the opposite of what America presently does.

The principle of prosocial punishment, like the moral culture principle of criminalization, thus has both an affirmative, justificatory dimension and a negative, prohibitory dimension. Affirmatively, the principle means that punishment must be of such a form and such severity as is necessary to overcome culturally the message of the crime. In its negative, prohibitory dimension, the principle means that punishment cannot itself become antisocial, cannot itself express norms contrary to maintaining shared ethical life. The observation spurring punishment theory since its philosophical inception is the anomaly of a community dedicated to the well-being of its members making the infliction of suffering its end. That is

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<sup>66</sup> Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 941 (2016).

<sup>67</sup> The twofold normative conclusion of *Two Cultures* is (1) the critique of American punishment for having become antisocial and (2) the affirmative principle that emerges from that critique: the principle of prosocial punishment. *See id.* at 1036.

why punishment seems to require special justification. Reconstructivism takes a distinctive view of this root problem. To a reconstructivist, because punishment does indeed make the infliction of suffering its end, it presents an expressive conundrum. Punishment does not just have the *capacity* to undermine collateral social norms; it has a genetic *tendency* to do so, at least in any society dedicated to the well-being of its members. Punishment theory as we know it begins at the very dawn of the Enlightenment because the idea that societies should be dedicated to the well-being of their members was the foundation of the Enlightenment political thought. Punishment is pulled by its nature to expressively disaffirm the norms on which social life is built, even as it affirms the norms violated by the crime. The fundamental challenge of punishment is thus to take action against offenders sufficient to deny the messages of their crimes without thereby undermining collateral norms. The principle of prosocial punishment centers on that challenge.

The second reason the principle of prosocial punishment is different than the expressive conception of punishment is that—with roots in communitarian consequentialism—the prosocial punishment principle recognizes punishment's practical, nonexpressive functions. If punishment's purpose is to restitch a torn social fabric, and the risk it courts is the risk of becoming antisocial itself, expressivism is not the only thing that matters. For example, imprisonment tends to damage families, insofar as it takes parents (usually fathers) away from their spouses and children. Any communitarian theory of criminal law should care about avoiding broken families, which gives reconstructivists good reason to favor noncarceral sanctions when possible and imprisonment close to families with generous visiting conditions otherwise. Reconstructivism endorses rehabilitative programming within prisons, opportunities and requirements to perform useful work, and physical safety from emotionally scarring and criminogenic conditions, because those sorts of features within prisons have prosocial effects after offenders are released. For the same reason, reconstructivism opposes collateral consequences that prevent offenders from returning to the social fold upon release, such as bars to employment. Reconstructivism also endorses restorative justice proceedings insofar as those proceedings recognize that crimes commonly damage interpersonal relationships and aim to repair those relationships. And reconstructivism is sensitive to the ways in which punishment's pervasiveness in certain communities, particularly poor, urban, African-American communities, damages the capacity of those communities to function in ways that support human flourishing. Indeed, as a sociological and communitarian theory, reconstructivism does not evaluate punishment merely in the individual

instance, but rather understands punishment as a cumulative practice with cumulative sociological effects. Reconstructivism thus recognizes special sociological risks in *patterns* of punishment, even where many or most of the individual instances of punishment making up the pattern are justified.

Many of these practical proposals push for a milder form of punishment than the United States now has, and one might wonder if the principle of prosocial punishment is necessarily mild—perhaps just a way of expressing philosophically the revulsion toward punishment that seems to animate, for example, many theorists of restorative justice.<sup>68</sup> The answer is no: the principle of prosocial punishment is not so one-sided. It *condemns* the wrong and insists on forms of punishment severe enough to be read within the culture as genuinely condemnatory. Light sentences for serious offenders are wrong: they diminish both the norm and, if there is one, the victim that the offender assailed. James Whitman has written that we should return to the mild, individualizing, and rehabilitative era of punishment that prevailed in the middle of the twentieth century, which he terms the era of “penal modernism.”<sup>69</sup> I suspect that the era of penal modernism was, if not as bad as the present, at least bad in its own way. The principle of prosocial punishment counsels mildness in the context of contemporary American punishment only because American punishment today is both extraordinarily severe and severe in ways that are counterproductive from the standpoint of restitching the social fabric. We expressively exclude and degrade offenders, and then we pragmatically exclude and degrade them, creating conditions that make ex-cons a permanent underclass. Our fundamental failure is not that we are harsh but that we are harsh in antisocial ways.

Criminal law judges, lawyers, and teachers, philosophical punishment theorists, and penal codes themselves commonly list four justifications for punishment: retribution, deterrence, rehabilitation, and incapacitation. Some include a fifth: expressive condemnation. There should be a fifth principle, but it should be a different fifth principle than “expressive condemnation.” The five should be: retribution, deterrence, rehabilitation, incapacitation, and normative reconstruction, where the last is understood according to the principle of prosocial punishment. That means punishment should not only be *expressive*, and should not only express *condemnation*, but should expressively and pragmatically reconstruct society’s normative order in the wake of a crime.

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<sup>68</sup> Kleinfeld, *Reconstructivism*, *supra* note 1, at 1522.

<sup>69</sup> James Q. Whitman, *The Case for Penal Modernism: Beyond Utility and Desert*, 1 CRITICAL ANALYSIS L. 143 (2014).

C. *The “We the People” Principle of Criminal Procedure*

The “We the People” principle of criminal procedure holds that the administration and enforcement of criminal law should be *by* and *of* the people—that is, solidaristic, public, embedded in local communities, primarily value rational rather than instrumentally or formally rational,<sup>70</sup> primarily under lay rather than official control, open to particularized and equitable acts of moral judgment, and seen by a democratic polity as procedurally legitimate. In short, the “We the People” principle holds that the values and the principles of institutional design undergirding the “We the People” formula in the U.S. Constitution should be the normative center of criminal procedure.

To understand what the “We the People” principle would mean in practice, it helps to see how profoundly the American procedural system has drifted away from it. The long arc of criminal procedure’s development has been toward ever-greater degrees of Weberian bureaucratization. As Weber presented it, bureaucratization’s defining features are the displacement of the laity by a professional corps of officials and experts; the use of technical expertise and rule-based administration in place of individualized moral judgment; and the triumph of instrumental rationality (that is, trying to attain a given set of ends as efficiently as possible) over value rationality (that is, trying to live in accord with a system of values).<sup>71</sup> It is remarkable how closely these three features track the history of criminal procedure. The professionalized corps of officials that define the modern world of criminal procedure—police forces, full-time prosecutors, and public defenders—emerged in the nineteenth and twentieth centuries.<sup>72</sup> Trials, which were once relatively brief, informal affairs involving ordinary language and moral judgment, evolved gradually into the formal, rule-bound, lawyer-controlled factual inquiry they are today.<sup>73</sup> Even constitutional doctrine in criminal procedure has come to have a bureaucratic orientation. Lawyers and judges since the start of the Warren Court’s procedural revolution have treated the Fourth, Fifth, and Sixth Amendments as tools, under the control of the professional legal community, by which to produce rules with instrumental ends: policing the police, controlling racial injustice, safeguarding individuals against abuses

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<sup>70</sup> This distinction comes from Max Weber. MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 24–26, 85–86 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., Univ. of Cal. Press 1978) (1922); *see also* Kleinfeld, *Manifesto*, *supra* note 38, at 1379–80.

<sup>71</sup> *Supra* note 70.

<sup>72</sup> LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 27–30, 67–68, 149, 245 (1993).

<sup>73</sup> *See id.* at 25, 245–50.

of state power, aiding law enforcement in arresting and prosecuting the guilty, and keeping the system reasonably efficient.

But these examples pale next to the paradigm case of bureaucratization, which is also the most important development in American criminal procedure's modern history: the displacement of the jury trial by plea bargaining. Doctrinally, plea bargaining turns chiefly on two things: the Supreme Court's view of the right to trial by jury in purely individual terms (not as reflecting an interest of the community in the case but as reflecting a defendant's individual and therefore waivable right to a jury trial)<sup>74</sup> and the Court's willingness to allow prosecutors immense discretion in the bargaining process for the sake of managing large caseloads and securing convictions rapidly and cheaply.<sup>75</sup> Both doctrinal developments satisfy bureaucratic imperatives of processing cases efficiently and violate the "We the People" principle by excluding the lay community from the criminal process.

Indeed, the "We the People" principle suggests a distinctive interpretation of what plea bargaining is and what is wrong with it. From a democratic-reconstructive perspective, the criminal jury trial in the Founding Era is best understood as an institution the essence of which was *to subordinate state power and state officials to the authority of a local laity and to empower that laity to deliberate in equitable, prudential, and particularistic ways*. In turn, plea bargaining is best understood as an institutional arrangement the essence of which is *to excise the laity from the administration of criminal justice, empowering state officials and other legal professionals to exercise control on the basis of the rule-oriented and instrumental reasoning characteristic of bureaucratic governance*. The very idea of bargaining over justice—negotiating charge and sentence in order to reduce the risks and costs of trial rather than evaluating the blameworthiness of an act of wrongdoing that breaches community norms—shifts criminal justice as a system from equitable particularism to instrumental rationality, from "morality play" to "machine," as Stephanos Bibas has memorably put it.<sup>76</sup>

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<sup>74</sup> See Laura I Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 440 (2009) ("The idea that jury trial rights meant community rights held sway until at least the mid-nineteenth century. . . . The jury trial right, particularly the criminal jury trial right, was almost entirely predicated on validating the community's right to propound moral judgments on local citizens, and little concerned with the defendant's individual rights and liberties.").

<sup>75</sup> See, e.g., *Brady v. United States*, 397 U.S. 742, 752–53 (1970) (holding that large sentencing discounts and threats of death do not prove coercion in plea bargaining and noting that "with the avoidance of trial, scarce judicial and prosecutorial resources are conserved").

<sup>76</sup> STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 1 (2012).

And what is wrong with that? The typical complaint about plea bargaining is that it is coercive, but from a democratic–reconstructive perspective, the bigger problem is that plea bargaining could not be worse at accomplishing reconstructive ends if it were designed to thwart them. Plea bargaining is very good at processing as many offenders as possible for as little money as possible. It is utterly unsuited to building social solidarity around a community’s commitment to the norm violated by the crime—exactly the thing criminal law on a reconstructive perspective exists to do. In plea bargaining, the community is absent from both the jury box and the courtroom, the solidaristic effect of the morality play is gone, the violated norm is just a legal infraction, the norm’s significance to the community is just one consideration in the bargain, and the expressive features of the whole affair are secondary to getting the case processed. The result enables the criminal system to move more offenders from street to prison than it ever could on a “We the People” approach, but what it sacrifices in so doing is the opportunity to reconstruct a violated normative order in the eyes of the community. Per Bibas: “[R]eforms may reduce the aggregate amount of retribution, deterrence, and incapacitation that the system can mete out. But sometimes it is worth sacrificing quantity for quality.”<sup>77</sup> The fundamental problem with plea bargaining from a democratic–reconstructive standpoint is that it is a procedure optimized for the wrong goal. The “We the People” principle would not require getting rid of it wholesale but would require sharply reducing it.

Plea bargaining is one example, albeit a paradigmatic example, of the degree to which the “We the People” principle would, by re-centering criminal procedure in democratic ways, work revolutionary changes in the present procedural system. What is interesting is that these changes are revolutionary only from the perspective of the present: the “We the People” principle is more faithful to the Founders’ Constitution than the last half century of criminal procedure has been. Of the various competing goals that presently orient Fourth, Fifth, and Sixth Amendment doctrine—policing the police, controlling racial injustice, unburdening law enforcement, keeping the system reasonably efficient, and safeguarding individual rights—the first four are utterly anachronistic and the last is misunderstood. The criminal justice system that emerged from the Anti-Federalists’ battles with the Federalists in the Founding Era was above all majoritarian and populist; the institutional design had more to do with enabling majorities to rule themselves than with safeguarding individual rights. Indeed, criminal law itself was conceptualized in the Founding Era

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<sup>77</sup> *Id.* at xxvii.

in political terms rather than individualistic ones. It is not too much to say that the “We the People” principle *was* the principle animating the criminal procedure amendments in the Founders’ Constitution. To say that is not to insist on some form of originalism. It is merely to argue that the “We the People” principle is in a residual sense *part of our law*, however much it would alter our present procedural system.

#### IV. THE PRESENT CRISIS

If the above three principles are sound, then what is principally wrong with American criminal justice has to do with the ways in which the present system has turned away from democratic–reconstructive ordering in all three of the major departments of criminal justice. We criminalize in purely positivistic ways that aim for sheer social control, directing the criminal instrument to norms over which there is no community custom or consensus. We punish in ways that say to criminals and the people who love or identify with them: “You (or the person you care about) are permanently evil or dangerous, a ruined being, forever outside the community of the law-abiding.” And we administer and enforce the law in ways that put the criminal system entirely in the hands of bureaucratic professionals reasoning in formal and instrumental ways rather than equitable and value-oriented ways.

How did we get here? The dominant narrative of our criminal justice system is that it is dysfunctional because the American voter is vengeful, violent, racist, ill-informed, stupid.<sup>78</sup> This persistent narrative is one of the deepest obstacles to democratic–reconstructive reform—a false picture that grips the mind because it is just true enough to get people to overlook its flaws and because it fits so effortlessly into a preexisting set of expectations many people, particularly among the intelligentsia, bring to American public life. We came to this dysfunctional present, the dominant narrative insists, through popular referenda, moralism about drugs, and a race to the bottom in which voters demanded harshness and politicians won office to the extent they supplied it. The solution then is to get the public off the field and leave criminal justice in the hands of responsible officials and experts.

But notice what a poor fit that narrative is with the nature of the problems just discussed. With respect to criminalization, the very problem with the law is how much everyday conduct it covers. That is not the normal result of political pressure from the American public. As Bill Stuntz has written: “[C]ontemporary criminal codes cover a good deal of marginal

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<sup>78</sup> See Kleinfeld, *Manifesto*, *supra* note 38, at 1398.

middle-class misbehavior—a very odd state of affairs, politically speaking.”<sup>79</sup> What really drives American overcriminalization, Stuntz argued, is not “[s]urface politics, the sphere in which public opinion and partisan argument operate,” which “ebb and flow, just as crime rates ebb and flow,” and which often “push toward broader liability, but not always, and not always to the same degree,” but a “deeper politics, a politics of institutional competition and cooperation,” which “*always* pushes toward broader liability rules.”<sup>80</sup> The key to American criminal law’s expansion, Stuntz thought, is not voters but prosecutors, who have an interest in broad criminalization (among other things because it greases the wheels of plea bargaining) and who effectively lobby legislatures for it.<sup>81</sup> Legislators too have an interest in accommodating prosecutors because broad criminal law that is rarely enforced makes crime control cheap.<sup>82</sup> The American public might be implicated indirectly insofar as they create a tough-on-crime atmosphere that makes legislators receptive to prosecutors’ wishes. But the story is not a simple one of lay citizens in black hats and officials in white.

The procedural case is even more dramatic. The American public is likely unaware that plea bargaining has replaced the criminal jury trial and would probably be dismayed to discover that fact. It was not lay citizens that did away with the trial, but legal insiders—prosecutors, judges, even public defenders—acting on their interests, and indeed acting to exclude lay citizens from participating.<sup>83</sup> That is to say, the single most important development in the modern history of American criminal procedure, and it seems empirically a major contributor to mass incarceration,<sup>84</sup> was not

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<sup>79</sup> Stuntz, *Pathological Politics*, *supra* note 22, at 509.

<sup>80</sup> *Id.* at 510 (emphasis original).

<sup>81</sup> *Id.* at 510, 519–20, 534–38.

<sup>82</sup> *See id.* at 550–52.

<sup>83</sup> As George Fisher has argued in the leading history of plea bargaining:

By [the nineteenth] century’s end, all three of the courtroom’s major actors—prosecutor, defendant, and judge—had found reasons to favor the plea bargaining regime. For prosecutor and judge, who together held most of the power that mattered, the spread of plea bargaining did not merely deliver marvelously efficient relief from a suffocating workload. It also spared the prosecutor the risk of loss and the judge the risk of reversal, and thereby protected the professional reputation of each.

GEORGE FISHER, *PLEA BARGAINING’S TRIUMPH* 16 (2003). The twentieth century added another insider constituency to plea bargaining’s supporters: “plea bargaining played a surprisingly direct role in assisting the creation of public defenders’ offices,” which “share[d] the prosecutor’s and judge’s interests in maximizing systemic efficiency—and hence in plea bargaining.” *Id.* at 17. The triumph of plea bargaining is thus a story of “powers and interests.” *Id.* at 16. Indeed, plea bargaining’s triumph is a story of “the power of the courtier,” who gains influence “by serving well the interests of those in high places.” *Id.* at 175.

<sup>84</sup> *See* JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM* 72–77, 133 (2017).

voters' doing. Now, again, perhaps the American public contributed by demanding a tough-on-crime approach that encouraged plea bargaining's excesses. But the decision to embrace plea bargaining as an institution, and the many thousands of individual case dispositions through plea bargaining, trace back to legal insiders.

The dominant narrative is at its strongest with respect to punishment. The American public in the era of high crime did indeed demand severe punishment. But even there, the case is not simple. American crime policy was lenient for most of the country's history; voters did not demand tough-on-crime policies before the mid-century crime wave, and seem to be moving toward greater leniency now that the crime wave has subsided.<sup>85</sup> There is also evidence of harshness on the other side. Some of the pressure for long sentences, for example, has come from prosecutors indulging a punitive temperament or seeking leverage for plea bargains.<sup>86</sup> Another source of harshness has been the sentencing guidelines, which are the apotheosis of bureaucratic ordering. And even in cases that seem to exemplify the public's punitive excess—inordinate sentences under three strikes laws for stealing golf clubs<sup>87</sup> or videotapes,<sup>88</sup> for example—it is worth bearing in mind that groups of prosecutors acting on an organizational basis had to file those charges and defend them on appeal, and a series of judges had to agree not to strike them down despite the Eighth Amendment's invitation to do so. Ordinary people are surprised and appalled by the cases precisely because the sentences offend ordinary sensibilities—precisely because that sort of excess is not what voters meant three strikes laws to do.

My point is not that the American public is wholly innocent and American officials wholly to blame for the criminal system's present harshness and dysfunction. The public *did* clamor for harshness in the late twentieth century. Furthermore, racism has undeniably contributed to the American criminal system's particular oppressiveness to black people, as well as to other minorities. My point is that the dominant narrative is much too simple. It overstates the degree to which voters gave rise to the present crisis. It dramatically understates the degree to which legal insiders and other bureaucratic forces contributed to the present crisis. And, above all, it does not adequately consider the routes by which change is likely to come.

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<sup>85</sup> Kleinfeld, *Manifesto*, *supra* note 38, at 1377–78 & n.29; Kleinfeld, *Two Cultures*, *supra* note 66, at 935–39, 987–91, 996.

<sup>86</sup> Stuntz, *Pathological Politics*, *supra* note 22, at 510, 519–20, 537–38.

<sup>87</sup> *Ewing v. California*, 538 U.S. 11 (2003) (plurality opinion).

<sup>88</sup> *Lockyer v. Andrade*, 538 U.S. 63 (2003).

As I have argued in past work,<sup>89</sup> my view is that the American criminal justice system's present harshness and dysfunction are the product of a toxic combination of popular fear and anger in an era of extremely high crime and a bureaucratic, instrumentalist approach to getting crime under control for minimal cost. But the popular anger is changeable: America was the leading example of penal mildness in the Western world from the 1770s through the early 1970s, and we have seen with the recent downtick in crime a resurgent movement toward mildness. What the history chiefly shows is that the American public turned to harshness during an era of soaring crime, which is unsurprising and not unreasonable, but that Americans are not *relentlessly* harsh: rather, they have the capacity for harshness but also for mildness and they respond to circumstances. The point is not just historical: moralistic patterns of thought have a *propensity* for changing register, shifting—sometimes quite suddenly—from punitive condemnation to equally moralistic but more forgiving ideas of compassion, dignity, and love.<sup>90</sup>

The other force standing behind American penal harshness and dysfunction, however, is a professional criminal justice community oriented above all to controlling crime as efficiently as possible. Lacking effective tools for rehabilitation, this approach leads to incapacitative forms of social exclusion just as pernicious as the moralistic anger, but less subject to *change*. The professional criminal justice community also has a disturbing set of interests and incentives—for example, the prosecutorial interest in broad, severe criminal codes (in order to secure easy plea bargains), the legislative interest in cheap crime control (which also favors broad, severe penal codes, as well as under-resourced and therefore brutal prisons), or the administrative interest in extensive regulatory criminal law (in order to secure compliance with the administrative state). These patterns of thought and incentives do not easily change and show no signs of slackening with the recent downtick in crime.

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<sup>89</sup> Kleinfeld, *Two Cultures*, *supra* note 66.

<sup>90</sup> For example, John DiIulio—who became famous in 1996 for his book endorsing harsh sentences for juvenile “super-predators”—had, while praying at mass on Palm Sunday of that very year, “‘an epiphany—a conversion of heart, a conversion of mind,’ in which it ‘just became crystal clear to me . . . that for the rest of my life I would work on prevention, on helping bring caring, responsible adults to wrap their arms around these kids.’” *Id.* at 1030 (quoting Elizabeth Becker, *As Ex-Theorist on Young ‘Superpredators,’ Bush Aide Has Regrets*, N.Y. TIMES (Feb. 9, 2001), <http://nyti.ms/1D36YpA> [<https://perma.cc/H95D-RQ2B>]). Or witness the profound moralism at work in Europe’s penal mildness, which was sponsored in Germany chiefly by churches, and which the European Court of Human Rights today enforces aggressively, frequently, and consistently in terms of human dignity and other morally charged terms. *Id.* at 951–55, 1000–02, 1033–35.

In short, the democratic impulse to anger is changeable and has a pronounced tendency to give way to democratic mercy. The bureaucratic desire for control really is relentless. It is time to try democracy.